“Quarterly” Board Meeting - March 11, 2021

The Members have scheduled a public meeting for March 11, 2020 (at 10:00 a.m.), which will be held at the Board’s Salem office (2601 25th St. SE, Ste. 150). The agenda for the Board meeting will be:

- The Members’ quarterly meeting. OAR 438-021-0010(1)(d).

Because of the Governor’s “social distancing” requirements, arrangements have been made to allow the public to participate in the meeting by means of a “phone conference” link. Information on how to participate by phone can be found at https://www.oregon.gov/wcb/Documents/brdmtgs/2021/31121-brdmtgconfinstructions.pdf

A formal announcement regarding this Board meeting has been electronically distributed to those individuals, entities, and organizations who have registered for these notifications at https://service.govdelivery.com/accounts/ORDCBS/records/1560067

Mediation Evaluation Project

The Workers’ Compensation Board will begin conducting a mediation evaluation project from April 1, 2021, through June 30, 2021. WCB will be sending evaluations to attendees of all held mediations. The purpose of the project is to increase feedback to WCB from mediation participants about their mediation experience. Evaluations will be mailed out and will include a postage-paid return envelope for your convenience. We would appreciate your participation in providing us with feedback during the 3-month project period.

New Web Page Launched - “Attorney Fee” Statistical Information - For Use in Future Biennial Review of Attorney Fee Schedules

As previously summarized, during their December 15, 2020, public meeting, the Members announced that information regarding ALJ and Board attorney fee awards would be shared with the public.

Consistent with that announcement, a web page has been created that concerns statistical reports, including attorney fees. The web page can be found here: https://www.oregon.gov/wcb/legal/Pages/statistical-reports.aspx
WCB Board News & Case Notes

CASE NOTES

Occupational Disease: “Preexisting Condition” Was Not “Mere Susceptibility”/“Passive Contributor”; Was Active Cause To Be Weighed

David Dunn, 73 Van Natta 142 (February 19, 2021). Analyzing ORS 656.802(2)(a), (e), and ORS 656.005(24)(b), on remand, SAIF v. Dunn, 297 Or App 206, rev den, 365 Or 557 (2019), the Board concluded that claimant’s occupational disease claim for apophysitis was not compensable because his apophysis had “actively contributed” to his claimed apophysitis condition to constitute a “preexisting condition” (rather than a susceptibility) and, therefore, the record did not establish that his work activities (while walking on his job at a hospital) were the major contributing cause of his claimed condition. Although acknowledging the treating podiatrist’s opinion that claimant’s apophysitis constituted a “susceptibility,” the Board considered such an assessment to be inconsistent with the podiatrist’s description of a mechanical contribution from the preexisting congenital condition to the claimed apophysitis, which was supportive of an “active” contribution from the apophysis.

Citing ORS 656.802(2)(a), the Board noted claimant’s burden of proving that his employment conditions were the major contributing cause of the claimed apophysitis condition. Referring to ORS 656.005(24)(b), the Board observed that, for occupational disease claims, a “preexisting condition” is “any injury, disease, congenital abnormality, personality disorder, or similar condition that contributes to disability or need for treatment and that precedes a claim for worsening.” Relying on ORS 656.802(2)(e), the Board stated that “preexisting conditions” shall be deemed “causes” that must be weighed in determining major causation. Referring to Murdoch v. SAIF, 223 Or App 144 (2008), the Board observed that a “susceptibility” is not a “cause” of a condition. Citing Dunn, Lowell’s v. SAIF, 285 Or App 161, 165 (2017), and Corkum v. Bi-Mart Corp., 271 Or App 411, 422-23 (2015), the Board reiterated that a condition that increases the likelihood that an affected body part will be injured by some other action or process, but does not actively contribute to damaging the body part, is a mere “susceptibility,” not a “preexisting condition.”

Turning to the case at hand, the Board referred to the court’s instruction that, if claimant’s unfused apophysis, combined with the micro-motion of his tendon pulling on the fibrous tissue when he walked, caused the apophysitis, then his apophysitis would properly be characterized as a preexisting condition under ORS 656.005(24)(b) and, consequently, would constitute a cause that must be weighed in determining major causation. The Board further noted the court’s conclusion that the podiatrist’s opinion that the congenital condition merely rendered claimant “susceptible” to the condition appeared inconsistent with the podiatrist’s description of the “mechanical” cause of the claimed inflammation.

After analyzing the podiatrist’s opinion, the Board found that the podiatrist’s opinion characterizing claimant’s preexisting congenital foot condition as a susceptibility was inconsistent with the description of the mechanical contribution from that condition. Reasoning that the podiatrist’s opinion supported the
proposition that the congenital condition had contributed to, and combined with, the micro-motion and, thus, actively contributed to claimant’s claimed inflammatory condition (apophysitis), the Board concluded that the podiatrist’s opinion described an “active,” rather than “passive,” cause of the claimed apophysitis.

Because the podiatrist’s opinion had considered the “preexisting condition” (apophysis) to be a “passive” contributor to the claimed apophysitis, the Board reasoned that the podiatrist had not persuasively weighed the contribution from the apophysis condition against employment exposures in evaluating the major contributing cause of the claimed apophysitis condition. Consequently, the Board held that the record did not establish the compensability of the claimed occupational disease.

Own Motion: Hearing Referral (“PTD” Issue)
Not Warranted - Claimant’s Veracity Concerning “Limitations/Willingness to Work” Not Challenged - “Documentary” Record Sufficiently Developed; “PTD” Not Established - “Non-Compensable” Conditions Cannot Be Considered

James P. Suter, 73 Van Natta 105 (February 10, 2021). Analyzing ORS 656.206(1)(d) and ORS 656.206(3), in reviewing claimant’s request for a permanent total disability (PTD) award arising from an Own Motion Notice of Closure concerning a new/omitted medical condition under his 1980 left knee injury claim, the Board held that: (1) a “fact finding” hearing was unnecessary to determine claimant’s entitlement to PTD benefits because his credibility/veracity was not at issue and the record was sufficiently developed to determine whether he was “permanently incapacitated” from gainful employment; and (2) claimant was not entitled to a PTD award because neither his attending physician’s opinion, nor an examining physician’s opinion with whom his attending physician concurred, distinguished between the disability that may be considered in evaluating his PTD status from the disability from other causes that may not be considered. Following the carrier’s voluntary reopening of his Own Motion claim for a left mid-femur amputation with infection, an Own Motion Notice of Closure granted additional scheduled PPD to reach a total of 100 percent scheduled PPD for the loss of use or function of the left leg (knee). Claimant requested review, seeking referral to the Hearings Division for a “fact finding” hearing, and entitlement to PTD benefits.

The Board held that a “fact finding” hearing was not necessary. Referring to Koskela v. Willamette Indus. Inc., 331 Or 362 (2000), and Laura A. Heisler, 55 Van Natta 3974 (2003), the Board stated that “hearing referrals” are permissible when the determination of entitlement to PTD benefits requires resolution of a claimant’s credibility or veracity regarding willingness and efforts to seek/obtain gainful employment, and when the record is insufficiently developed. Conversely, the Board reiterated that “fact-finding” hearings are unnecessary when the record is sufficiently developed and the claimant’s credibility or veracity is not at issue. See Lloyd D. Irwin, Jr., 70 Van Natta 797, recons, 70 Van Natta 1093 (2018).
Applying the aforementioned principles to the case at hand, the Board noted that claimant had asserted that there was sufficient information in the record to establish his entitlement to PTD, and that the carrier had not challenged the truthfulness of his affidavit representations concerning his physical limitations and willingness to work. The Board further observed that both parties had already presented documentary evidence regarding claimant’s PTD claim. Finally, the Board commented that claimant’s credibility and veracity were not at issue.

Under such circumstances, the Board concluded that there was sufficient evidence to analyze whether claimant was permanently incapacitated. Consequently, the Board concluded that a “fact finding” hearing was not necessary. See John R. Taylor, 68 Van Natta 1866 (2016); Michelle A. Griffith, 68 Van Natta 1505, recons, 68 Van Natta 1731 (2016).

Addressing the merits of the PTD claim, the Board held that claimant was not entitled to PTD benefits. Referring to ORS 656.278 and James S. Daly, 58 Van Natta 2355 (2006), the Board reiterated that the following factors are considered in determining a claimant’s entitlement to PTD on closure of an Own Motion claim regarding a new/omitted medical condition: (1) disability for a previously accepted condition is considered as it existed at the last claim closure that preceded the expiration of the claimant’s 5-year aggravation rights; (2) any disability that predates the initial compensable injury is also considered; and, (3) when such disabilities exist, they are considered with any disability from the "post-aggravation rights" new/omitted medical condition to determine whether the claimant has established entitlement to PTD. Citing Fimbres v. SAIF, 197 Or App 613 (20015) and Patrick S. Holman, 65 Van Natta 1044 (2013), the Board noted that denied conditions and disability that develop as the result of a preexisting condition after the compensable injury, but not as a result of the employment, may not be considered in determining PTD status. Relying on Elsea v. Liberty Mutual Ins., 277 Or App 475 (2016), and Clark v. Boise Cascade, 72 Or App 397 (1985), the Board stated that, considering the Daly factors, a claimant may establish entitlement to PTD by proving that: (1) he was completely physically disabled and therefore precluded from gainful employment; or (2) his physical impairment, combined with various social and vocational factors, effectively precluded gainful employment under the “odd lot” doctrine.

Turning to the case at hand, the Board found that claimant’s prior right knee injury concerning a previous claim, which had resulted in a permanent disability award, could be considered in determining his PTD status because the preexisting right knee condition caused “disabling effects” before his 1980 compensable injury regarding his current Own Motion “new/omitted medical condition” claim. The Board further reasoned that the disability from claimant’s previously accepted left knee conditions (including a TKA for which his claim had been reopened before the expiration of his aggravation rights and had resulted in a permanent disability award), could also be considered. See Coombs v. SAIF, 39 Or App 293 (1979).

However, the Board found that claimant’s right knee conditions had been denied under his 1980 claim and that a right shoulder condition had not caused “disabling effects” before his 1980 injury. Consequently, the Board determined that any disability from a worsening of those conditions and their related surgeries could not be considered in determining his eligibility for PTD benefits under his 1980 left knee injury claim. Consequently, the Board confined its review of
Any disability from denied conditions are not considered.

Attending physician stated claimant could return to sedentary work as a result of knee injury.

Disability from unrelated cardiopulmonary issues not considered in PTD evaluation.

The claimant’s PTD claim to whether disability from his previously accepted conditions at the last claim closure before the expiration of his aggravation rights, disability from his preexisting right knee condition that predated his 1980 injury, and disability from the “post-aggravation rights” new/omitted medical condition established his entitlement to PTD benefits.

After conducting its review, the Board acknowledged that the attending physician had stated that claimant could not return to work as a result of his AKA, but that sedentary work “could be possible.” The Board further noted that the attending physician had subsequently concurred with the examining physician’s opinion that claimant was “completely disabled.” Nevertheless, the Board considered the examining physician’s opinion to be ambiguous and inconsistent because the physician had also stated that claimant could easily lift/carry up to 10 pounds occasionally, which was consistent with his and the attending physician’s earlier opinions that claimant was capable of “sedentary” work. The Board further observed that the examining physician had emphasized claimant’s “cardiopulmonary reserve” and “cardiopulmonary issues,” which could not be considered in evaluating his PTD claim.

Under such circumstances, the Board determined that neither physician had distinguished between the disability that may be considered under the Daly rationale and the disability from other causes that may not be considered. Consequently, the Board concluded that the record did not establish claimant’s entitlement to PTD benefits under the “odd lot” doctrine or by proving he was “completely physically disabled.” See Timothy C. Guild, 70 Van Natta 1207, 1210 (2018); Shakur Shabazz, 65 Van Natta 1551 (2013).

Own Motion: Premature Closure - Condition “Med Stat” - Claimant Declined Surgery - “005(24)”;
“Medical Arbiter” Request - Not For “Worsened Condition” - “278(1)(a)”

Nancy L. Popma, 73 Van Natta 91 (February 3, 2021). Applying ORS 656.268(1), ORS 656.278(6), and OAR 438-012-0055, the Board held that the Own Motion Notice of Closure for claimant’s worsened condition claim for a previously accepted bilateral knee arthritis condition was not premature because the accepted condition (for which she had declined surgery and had not sought further medical treatment) was medically stationary. Claimant requested Board review of the closure notice, contending that her claim was prematurely closed or, alternatively, she was entitled to a medical arbiter examination.

The Board disagreed with claimant’s contentions. Citing Sullivan v. Argonaut Ins. Co., 73 Or App 694 (1985) and Arvin D. Lal, 55 Van Natta 816, 823 (2003), the Board reiterated that the propriety of the Own Motion Notice of Closure depends on whether claimant’s accepted conditions were medically stationary, considering the conditions at that time. Referring to ORS 656.005(24), the Board stated that “medically stationary” means no further material improvement would reasonably be expected from medical treatment or the passage of time.
No medical arbiter available for closure of a “worsened condition.”

Claimant contended the attending physician’s concurrence was not supported by the medical record.

Attending physician was aware of claimant’s reported pain before concurring with examining physician.

Turning to the case at hand, the Board found that claimant’s examining physicians had opined that her condition was medically stationary because she had declined to pursue total bilateral knee replacement surgery. The Board further noted that claimant had not sought further treatment. Under such circumstances, the Board concluded that the claim had not been prematurely closed.

Finally, the Board addressed claimant’s request for a medical arbiter. Noting that claimant had requested review of a Notice of Closure concerning a “worsened condition” claim, the Board reasoned that she was not entitled to the appointment of a medical arbiter. See ORS 656.278(1)(a), (b); OAR 438-012-0060(6); Von D. Bailey, 59 Van Natta 847, 849 (2007).

Premature Closure: “Sufficient Information” to Close Claim - “Qualifying Statement” - “AP”
Concurrence With Examining Physician’s “No Permanent Impairment” Opinion - “AP” Unequivocal Work Release - “268(1)(a),” “30-0020(2)(a)”

Stephanie Sherman, 73 Van Natta 125 (February 16, 2021). Applying ORS 656.268(1)(a) and OAR 436-030-0020(2)(a), the Board held that a carrier had not prematurely closed claimant’s right foot injury claim because her attending physician’s concurrence with an examining physician’s opinion (which had concluded that claimant was medically stationary without any permanent impairment) and the attending physician’s unequivocal release to regular work constituted a “qualifying statement” of no reasonable expectation of permanent impairment or work restrictions due to the accepted condition and, as such, established there was “sufficient information” to close the claim. Claimant requested a hearing regarding an Order on Reconsideration, contending that her claim was prematurely closed because her attending physician’s concurrence was not supported by the medical record that included references to her foot pain and difficulty performing her work tasks.

The Board disagreed with claimant’s contention. Citing ORS 656.268(1)(a) and OAR 436-030-0020(1)(a), the Board noted that claim closure is authorized when the worker “has become medically stationary and there is sufficient information to determine permanent disability.” Referencing OAR 436-030-0020(2)(a) and Kevin S. Tucker, 68 Van Natta 1930, 1934 (2016), the Board observed that “sufficient information” requires either a qualifying statement of no permanent disability or a qualifying closing report. Finally, relying on OAR 436-030-0020(2)(c) and Marshal E. Shaw, 71 Van Natta 1328, 1333 (2019), the Board stated that, unless there is clear and convincing evidence that an attending physician has released the worker to the job held at the time of injury (or that the worker has returned to it), “sufficient information,” includes an accurate description of the physical requirements of the worker’s job, the worker’s wage, date of birth, work history, and level of formal education.

Turning to the case at hand, the Board found that the attending physician was aware of claimant’s reported pain before concurring with the examining physician’s opinion that claimant was medically stationary without any permanent
impairment or work restrictions related to her accepted right foot condition. The Board further noted that the attending physician had unequivocally released claimant to her job at the time of injury.

Under such circumstances, the Board determined that the attending physician’s concurrence with the examining physician’s finding of no impairment was a “qualifying statement” of no permanent disability. Moreover, the Board reasoned that the attending physician’s unequivocal work release constituted clear and convincing evidence that claimant had been released to regular work. Accordingly, the Board concluded that the carrier had sufficient information to close the claim and, as such, the claim had not been prematurely closed.


Joseph L. Hunter, 20-01175, 73 Van Natta 96 (February 9, 2021). Analyzing ORS 656.214(1)(d), 2(a), ORS 656.726(4)(f)(E), and OAR 436-035-0005(14), the Board held that claimant was entitled to a work disability award because, although his attending physician had initially released him to his regular work, that release had not included all of the tasks that claimant had customarily performed. In requesting a hearing regarding an Order on Reconsideration (which had granted work disability), the carrier contended that claimant was not entitled to such benefits. In doing so, the carrier asserted that additional duties (e.g., lifting boards and using a sledgehammer) that claimant had identified (which prompted the attending physician to conclude that claimant was unable to perform his “regular work”) were not a requirement of his “at-injury” job.

The Board disagreed with the carrier’s contention. Citing Thrifty Payless, Inc. v. Cole, 247 Or App 232, 237 (2011), the Board stated that, for purposes of entitlement to a work disability award, “regular work” is the “paid labor, task, duty, role, or function that the worker performed on a recurring or customary basis.” Referring to Wright v. SAIF, 295 Or App 151, 154 (2018), the Board noted that “regular work” includes tasks performed on a customary basis, even if those tasks are not part of a worker’s regular job description. Relying on Tyrel Albert, 66 Van Natta 1212, 1216 (2014), the Board reiterated that whether a worker has been released to “regular work” is evaluated on the evidence in the record, including medical records describing the work that claimant was performing when he was injured, his own description of his work history, the employer’s regular job description, and the evidence about his post-injury physical capacity.

Turning to the case at hand, the Board acknowledged the carrier’s contention that claimant was not required to perform the tasks in the manner that he had described. Nonetheless, the Board found, based on claimant's affidavit (which was presented during the reconsideration proceeding), that he had regularly performed work duties at his “at-injury” job that had prompted his attending physician to conclude that he was unable to perform his “regular work.”
Under such circumstances, notwithstanding the absence of these tasks from the employer’s job description, the Board concluded that such tasks were performed by claimant on a customary basis at his “at-injury” job and, as such, he had not been released to his regular work. See Wright, 295 Or App at 154, Cole, 247 Or App at 237, and Marcus Ruiz, II, 66 Van Natta 777, 780 (2014); Brian D. Porter, 61 Van Natta 2405, 2408 (2009) (the claimant was not released to regular work and did not return to regular work where he manually lifted over 50 pounds at work before his injury, even though he had the option to use a lift or crane for lifting, but was restricted from such lifting after his injury). Consequently, the Board held that claimant was entitled to a work disability award.

APPELLATE DECISIONS UPDATE

Premature Closure: “Insufficient Info” to Close Claim - Carrier Did Not Seek Clarification of AP’s Inconsistent Opinions - “268(1)(a)”

Penalty: Unreasonable Claim Closure - “268(5)(f)”

Wise Connect, Inc. v. Al-Rawas, 309 Or App 166 (February 3, 2021). The court affirmed without opinion the Board’s order in Humzah Al-Rawas, 71 Van Natta 1133 (2019), previously noted 38 NCN 10:12, which held that claimant’s thoracic fracture injury claim was prematurely closed because there was insufficient information to close the claim based on the attending physician’s inconsistent opinions concerning claimant’s “medically stationary” status, and assessed a penalty under ORS 656.268(5)(f) for unreasonable claim closure because the carrier had not sought clarification of the attending physician’s inconsistent opinions before closing the claim.